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Employers Mutual Liability Insurance Company Of Wisconsin v. The Industrial Commission Of Utah, Et Al : Defendnat's Brief

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IN THE SUPREME COURT OF THE STATE OF UTAH

EMPLOYERS MUTUAL LIABILITY INSURANCE COMPANY OF WAUSAU,

Plaintiff,

— vs. —

THE INDUSTRIAL COMMISSION OF UTAH, ET AL

Defendant.

Case No. 10921

DEFENDANTS' BRIEF

APPEAL FROM ORDER OF THE INDUSTRIAL COMMISSION OF UTAH

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NATURE OF THE CASE

This case involves a claim filed with the Utah State Industrial Commission on behalf of Wendy Sue Russon, the two year old surviving child of decedent employees of A-1 Quality Glass, Inc., for benefits under the Utah Workman's Compensation Act.

DISPOSITION BEFORE INDUSTRIAL COMMISSION

The Industrial Commission entered its Order on March 9, 1967, requiring that Plaintiff pay the prescribed

statutory benefits under the Utah Workman's Compensation Act to Wendy Sue Russon, the minor child of decedent employees.

RELIEF SOUGHT ON APPEAL

Defendants seek to have this Court affirm the Order of the Industrial Commission entered March 9, 1967, from which the Plaintiff has appealed.

STATEMENT OF FACTS

Although Plaintiff has endeavored to set forth the facts in his Brief they appear to reflect somewhat Plaintiff's views as to the inferences it would like to draw rather than the facts found by the Commission. For this reason Defendants submit the following additional facts which appear in the record:

On September 26, 1965, Plaintiff issued its policy of "compensation" insurance to A-1 Quality Glass, Inc., hereinafter referred to as A-1. Sometime after receiving the policy and prior to October 19, 1965, A-1 requested Plaintiff to recalculate the premium because it seemed too high. (R-30) On or about October 19, 1965, Plaintiff sent A-1 an endorsement (R-82) which in the upper right hand corner under the printed designation "amount due" appeared the figures $161.15 CR. A-1's initial premium for the prior year's policy was $145.90 (R-95). On December 3, 1965, Plaintiff claims it mailed A-1 the notice of cancellation which appears at R-91. The record does not contain any competent evidence that the purported notice of cancellation was ever received by A-1. Plain-

tiff also claims that it sent a copy of the said notice of cancellation to the Industrial Commission Compensation Division. A copy of the notice does appear in the Commission's file; however, the copy does not bear a date as to when it was received (R-74). Mrs. Virginia Leahy, the policy clerk at the Commission who normally handles such notices testified that the notice had not been received by the Department by December 17, 1965, which is the date that she left for her vacation (R-76-77). When she returned from her vacation on January 3, 1966 a copy of the cancellation notice was in her basket (R-76-77). Mrs. Leahy further testified that Plaintiff never did provide the Commission with a formal cancellation card like all the other insurance companies furnish and like Plaintiff had furnished in all prior cases while Mrs. Leahy had been the policy clerk (R-73, 76). Mrs. Leahy further testified that the purported notice did not contain the reason for cancellation as is required by the Commission (R-73).

Two days before the purported cancellation was to take effect Plaintiff negotiated A-1's check dated December 8, 1965, in the amount of $161.15, which it mistakenly thought was the amount due (R-87). Sometime in January, 1966, A-1 received Plaintiff's statement (R-88) showing the credit of $161.15 as a cash payment and a balance due on the policy of $99.75.

On January 19, 1966, the fatal air crash occurred killing Jack E. Horton, the President of A-1, and Barbara Horton, his wife, the secretary of A-1, and both parents of the claimant, Wendy Sue Russon. After the

fatal crash, A-1 submitted its check in the amount of $99.75 (R-89) to Plaintiff and received back a letter from Plaintiff (R-90) returning the check and indicating that the insurance coverage was cancelled December 15, 1965. Thereafter in March, 1966, Plaintiff completed an audit of a prior policy which A-1 had had with Plaintiff and further determined that the amount of earned premium due to Plaintiff for the period 9-26-65 to 12-15-65 was the sum of $78.10 (R-97). Plaintiff did not at any time return or offer to return any of the balance of the unearned premium which remained from A-1's initial payment of the $161.15.

ARGUMENT

POINT I

PLAINTIFF DID NOT COMPLY WITH THE LAW IN ATTEMPTING TO EFFECT A CANCELLATION OF THE POLICY.

The law is well established that policy forfeitures are abhorred by the Courts. As stated in Couch on Insurance 2d, Volume 6, Section 32:59, pp 277:

> "It is necessary that the policy manifest a clear intention that it may be forfeited for nonpayment of premiums. Any ambiguous word, expression, or provision relating to forfeiture for nonpayment of premiums is to be interpreted against the insurer. Every reasonable presumption is against such a forfeiture, and a forefiture will not be enforced when against equity and good conscience."

In that climate we should examine the requirements to effect a cancellation. Couch on Insurance 2d, Volume 6. at Section 32:99, pp 322 states:

> "The insurer must comply with a statute regulating the notice to be given of forfeiture for nonpayment of premiums. If the insurer fails to comply with the statutes its purported forfeiture of the policy has no effect."

The Utah Statutes in Section 31-19-14, Utah Code Annotated, 1953, spell out the notice requirements to be given for a cancellation based on a nonpayment of premium. The pertinent part of Section 31-19-14 reads as follows:

> ". . . in case of nonpayment of premium by 30 *days notice* by such insurance company . . . *to the Industrial Commission and the employer.*" (Emphasis added)

Close examination of Plaintiff's purported notice of cancellation (R-91) is invalid on is face. It bears a date of December 3, 1965, and then purports to cancel the insurance policy as of 12:01 a.m. December 15, 1965, some twelve days later. The notice completely ignores the 30-day statutory requirement. As the authorities indicate, a notice which does not meet the requirements of the statute if a nullity.

It is further interesting to note that there is no evidence in the record as to when the purported notice of cancellation was delivered to A-1. There does appear at R-112 a mail arrival notice which was not received in evidence at the hearing but was submitted later by way of a Memorandum of Authorities by Plaintiff's counsel.

It is also apparent that Plaintiff did not comply with the statutory requirement that a notice of cancellation must be served upon the Industrial Commission. As indicated by the record the Commission was never furn-

ished with a regular cancellation card that Plaintiff and other insurers normally use to effect cancellations (R-73, 76). As further indicated by the record the letter notice of December 3, 1965 did not contain the reason for cancellation as required by the Commission nor had it been received by the Commission as late as December 17, 1965 (R- 76, 77). The clerk did state that when she returned from vacation on January 3, 1966, the notice was in her filing basket.

Plaintiff suggests that the letter notice of December 3, 1965 was timely sent to the Industrial Commission. However, no competent evidence was presented by Plaintiff nor was a return mail receipt evidencing delivery to the Commission as of a certain date submitted. Not even with its Memorandum of Authorities did Plaintiff's counsel offer a return receipt showing delivery to the Commission. Indeed even accepting Plaintiff's position for the purpose of argument, the thirty-day period after the notice was received by the Commission may well have run after the January 19th date of the fatal accident. At best Plaintiff's cancellation notice was not received by the Industrial Commission until after the purported effective date of cancellation.

Plaintiff argues in its Brief that the cancellation was not to take effect until 30 days after the 12:01 a.m. December 15, 1965 deadline. This appears to be a make weight argument in an attempt to rehabilitate an obviously defective notice. Plaintiff refers to this 30 day period as the statutory period in which A-1 had the right to pay the premium to *reinstate* the policy. It will

be noted that the statute does not refer to any such lapse period or any such period wherein a reinstatement may be effective. The statute clearly and plainly states that the only way a policy of industrial compensation insurance may be cancelled in case of nonpayment of premiums is by "30 *days notice" to the Industrial Commission and the employer.* This mandate of the statute was not complied with and Plaintiff should not now be permitted to take the position that its cancellation notice really didn't mean what it said, i.e. that cancellation would take effect at 12:01 a.m. December 15, 1965, but what it really meant was that cancellation was to take effect thirty days after December 15, 1965. Plaintiff simply did not comply with the statute and the purported notice was ineffective to invoke a cancellation.

POINT II

PLAINTIFF RESCINDED ITS PURPORTED NOTICE OF CANCELLATION BY RECEIVING AND CASHING A-1's CHECK IN THE AMOUNT OF $161.15 TWO DAYS PRIOR TO THE DATE THE PURPORTED CANCELLATION WAS TO TAKE EFFECT.

Certainly Plaintiff should not be allowed to blow hot and cold and its intentions should be judged by its conduct. It would appear obvious that Plaintiff intended to rescind its purported notice of cancellation when it received and negotiated A-1's check (which was mistakenly tendered to cover the entire premium) in the amount of $161.15. The exhibit (R-87) clearly shows that the check dated December 8, 1965 was negotiated and paid on December 13, 1965.

Plaintiff further indicated that it had rescinded its notice of cancellation when it sent its statement (R-88) to A-1 in January, 1966 showing a payment of cash on December 10, 1965 in the amount of $161.15 and a balance due of $99.75. Why did Plaintiff accept and negotiate A-1's check without conditions if it did not intend to rescind its notice and leave the policy in effect? Of the $161.15 received, Plaintiff needed only $78.10 to completely pay for A-1's coverage to December 15, 1965. If it did not intend to rescind its cancellation notice why didn't Plaintiff immediately offer to return the $83.05 surplus?

The statements of Plantiff's manager, Robert F. Larson on cross examination reflect the intention of Plaintiff to rescind the cancellation notice. Reading from page 64 and 65 of the record:

> "Q. Now as a matter of fact your notice of cancellation was dated December 3rd — the one you claim that was sent, 1965 — purporting to cancel on December 15, 1965, and yet your company received and endorsed this check No. 6 — Exhibit No. 6 — on December 13, 1965?
>
> A. Yes.
>
> "Q. And so your company took those funds, $161.15, —
>
> "A. That's true, yes.
>
> "Q. — and applied them on this policy premium payment? (Referring to Exhibit No. 5.)
>
> "A. Yes.
>
> "Q. Was any other notice ever sent — any other cancellation notice ever sent — after this notice of December 3, 1965?

"A. No notice of cancellation. No other notice of cancellation was sent.

"Q. So after your company received this Exhibit No. 6 — this check for $161.15 — and negotiated it, prior to the effective date of the cancellation, your company did not send out another notice of cancellation?

"A. No.

"Q. And in fact after your company received and endorsed and negotiated this check — Exhibit No. 6, in the amount of $161.15 — your company then submitted a statement, marked Exhibit No. 7, showing a balance due of $99.75 on this policy which has been received in evidence as Exhibit No. 5?

"A. That's true."

It is submitted that Plaintiff, by its conduct, rescinded the purported notice of cancellation.

POINT III

BY ITS CONDUCT PLAINTIFF HAS WAIVED ITS RIGHT TO INVOKE A CANCELLATION AND FORFEITURE OF A-1'S POLICY OF INSURANCE.

Plaintiff argues in its Brief that a part payment of premium does not *reinstate* an insurance policy. Absent any elements of waiver or estoppel with respect to such payment, Plaintiff would be correct. But in the case before the Court we do not have a situation of a payment after a policy has expired or been cancelled. This is clearly not a case of part payment in an attempt to *reinstate*. This is a case where an amount less than that claimed due was paid by the policyholder and accepted by the Insurer without condition, prior to the purported cancellation date.

Going once again to Couch on Insurance 2d, Volume 6, we find the following general rules with respect to the acceptance and retention of overdue payments. The applicable part of the pertinent sections read as follows:

Section 32:336, pp 558:

> "In the absence of controlling authority, contract, or charter provision or by-law, the general rule is that an insurer which receives, accepts, and retains past-due premiums, assessments, or dues, paid subsequent to the due date and expiration of the days of grace, if any, renews the contract and waives the forfeiture for nonpayment, provided such acceptance is unconditional and the facts are known. Any provision of a life insurance policy for immediate lapse upon nonpayment of interest is waived by the acceptance of a premium payment; *the insurer cannot at the same time accept the premium* payment and declare *the policy lapsed, nor can it lapse automatically at that time.*" (Emphasis added)

Section 32:338, pp 562:

> "The acceptance and retention of part of the overdue premium or assessment likewise has the effect of waiving th default of the insured, for the insurer has no right to even the part payment unless there is in existence a policy or contract of insurance to which the part payment is referable. Forfeiture for nonpayment of a premium when due is waived by accepting and retaining a partial payment, where the insured is led to believe that his policy is still in force."

Section 32:356, pp 577:

> "The acceptance of unearned premiums with knowledge of existing grounds for forfeiture constitutes a waiver of the forfeiture. Again, the

> retention by the insurer, with full knowledge of a breach by the insured of the conditions of his policy, of an unearned premium paid to it, and a failure to tender a return thereof to the insured when pleading a forfeiture in an action on the policy, amount to both waiver and estoppel in pais."

And so the Utah Court in the case of *Sullivan v. Beneficial Life Insurance Company,* 91 U. 405, 64 P.2d 351, held quoting from the opinion of the Court in that case which cites the earlier case of *Loftis v. Mutual Insurance Company,* 38 U. 532, 114 Pac. 134, at page 360 of 64 P.2d, the Court states this:

> "While it is true that the contract of insurance in in this case provides that, in case any installment of the premium was not paid when due, all rights under the policy lapsed or the policy ceased to be effective, yet such a provision was for the benefit of appellant, and it had the undoubted right to treat the policy as in force, although cause for forfeiture existed. *That insurance companies may waive prompt payment of policies,* although such payment is of the essence of the contract of insurance and may continue and treat policies in force after all rights thereunder have lapsed by reason of a provision therein that nonpayment of the premium or any part thereof shall cause the policy to become void and of no force or effect, *is too well settled to admit of dispute."* (Emphasis added)

The Court further states at page 361 of 64 P.2d that if an attempt to collect a premium after forfeiture constitutes a recongition of the contract as being in force (as held in a prior case), certainly actual payment of past due premiums and receipt thereof by the insurer without conditions attached, must be given the same effect.

It is not the position of A-1 that the mere sending of statements constitutes a recognition of the existence of insurance and waiver of payment as Plaintiff cites under his Point III quoting from the *Ellerbeck v. Continental Casualty Company,* 63 U. 530, 227 Pac. 805.

It is A-1's position that the acceptance of a major part of the premium prior to the purported cancellation date without condition and then the sending of a statement some two or three weeks later which reflected the payment and showed a balance, combine to establish that Plaintiff has waived its right to forfeit the policy for nonpayment of premium.

Referring back to the Ellerbeck case it is interesting to note that the Court held against the insurance company, ruling that it was a question for the trier of fact whether the insurer had extended credit to the policyholder for payment of premiums. Of course, in this case the trier of fact has already reached the conclusion that Plaintiff in effect extended credit to A-1 for the payment of the balance of the premium.

POINT IV

PLAINTIFF SHOULD BE ESTOPPED TO CLAIM THAT THE INSURANCE POLICY COVERING A-1 WAS NOT IN FORCE AT THE TIME OF THE LOSS.

While waiver has been defined as the intentional relinquishment of a known right and is consensual in nature, an estoppel is not consensual in character but is given effect to defeat the inequitable intent of the party estopped. *Seavey v. Erickson,* 244 Minn. 232, 69

NW2d 889, 52 ALR 2d 1144. As set forth in Point III, Defendants claim the doctrine of waiver with respect to Plaintiff. In addition to waiver it is submitted that the doctrine of estoppel is also available to A-1 as against Plaintiff.

The facts as outlined and reviewed herein clearly indicate that the Plaintiff led A-1 to believe that it was covered by Plaintiff's policy. The credit initially extended to A-1 when the policy was first written, the acceptance and cashing of A-1's check for $161.15 without conditions prior to the purported cancellation date, the sending of the statement acknowledging the payment and indicating credit for the balance, all could and did reasonably induce A-1 to rely and believe it was covered. It should further be noted that a proration of the insurance premium came to less than $32.00 per month and as indicated by Plaintiff's own witness and by the subsequent audits of the coverage, at the time of the purported cancellation only $78.10 of the $161.15 had been earned. The provisions of the insurance policy in question spell out with particularity the responsibility of Plaintiff in the event it cancels the insurance. Reading from Paragraph 15 of the policy at R-86:

> "If the company cancels, earned premiums shall be computed prorata. Premium adjustment may be made at the time cancellation is effected and, if not then made, shall be made as soon as practicable after cancellation becomes effective."

No refund of unearned premium was ever made. Clearly Plaintiff should be estopped to claim a forfeiture of the insurance coverage.

POINT V

THE COMMISSION DID NOT ERR IN MAKING THE FINDINGS AND CONCLUSIONS AS SET FORTH IN ITS ORDER.

Plaintiff complains that the Commission erred in failing to make various additional Findings of Fact and Conclusions of Law. The pertinent part of Section 35-1-85, Utah Code Annoated, 1953 reads as follows:

> "After each formal hearing, it shall be the duty of the commission to make findings of fact and conclusions of law in writing and file the same with its secretary. The findings and conclusions of the commission on questions of fact shall be conclusive and final and shall not be subject to review; such questions of fact shall include ultimate facts and findings and conclusions of the commission."

A reading of the cases interpreting this section clearly indicate that the Industrial Commission is not required to make specific findings upon all questions of fact. As stated in the case of *Denver & R.G.W.R. System v. Industrial Commission of Utah et al*, 66 U. 494, 243 Pac. 800: "The Industrial Commission is not required to make specific findings." However, it is submitted that the Commission did make findings with respect to the main issues involved and did find and conclude that A-1 Quality Glass, Inc. was covered at the time of the fatal plane crash with Workman's Compensation Insurance by Employers Mutual of Wausau.

It should further be noted that the cases have determined that the Commission has the prerogative of making the determination of facts which will not be disturbed in the absence of capricious or arbitrary action. *Dalton v.*

Industrial Commission, 8 U.2d 353, 334 P.2d 763. It would seem readily apparent that the Commission's determination of the facts in this case is not arbitrary or capricious.

CONCLUSION

In conclusion it is submitted that there is ample substantial evidence in the record to support the Findings, Conclusions and the Order entered by the Industrial Commission with respect to insurance coverage by the Plaintiff. The Order of the Industrial Commission should be affirmed.

Respectfully submitted,

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